Supreme Court, U.S.
FILED

10-811 OCT 25 2010

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

VIRGIL E. DAY, JOSIAH L. HOOHULI, PATRICK L. KAHAWAIOLAA, and SAMUEL L. KEALOHA, JR.,
Petitioners,

v.

HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trusee of the Office of Hawaiian Affairs, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WALTER R. SCHOETTLE
Counsel of Record
P.O. BOX 596
HONOLULU, HAWAII 96809
(808) 537-3514
papaaloa@umich.edu

Attorney for Petitioners

December 15, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

1. Whether officials of the State of Hawaii may expend funds subject to the trust established by § 5(f) of the Hawaii Admission Act for the betterment of Hawaiians without regard to the blood quantum established by § 201(a)(7) of the Hawaiian Homes Commission Act, 1920?

List of Parties

Petitioners:

Virgil E. Day, Josiah L. Hoohuli, Patrick L. Kahawaiolaa, and Samuel L. Kealoha, Jr.

Respondents:

Haunani Apoliona, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; Rowena Akana, Donald Cataluna, Colette Y. Pi'ipi'i Machado, Boyd P. Mossman; Oswald Stender, John D. Waihe'e IV, Walter Meheula Heen, and Robert K. Lindsey Jr., individually and in their official capacities as Trustees of the Office of Hawaiian Affairs; Dante Carpenter and Linda Keawe'ehu Dela Cruz, former Trustees, in their individual capacities;

State of Hawaii, Defendant-Intervenor (granted); and

Wendell Marumoto, Plaintiff-Intervenor (denied).

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Opinions in the Case 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 5

Reasons for Allowance of the Writ 10

A. How the native Hawaiians lost their land. 10

B. Hawaiian Homes Commission Act, 1920 12

C. Statehood. 13

D. The OHA fraud. 15

E. The Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. 22

Appendix:

OPINION, *Day v. Apoliona*, CA No. 08-16704 (Ninth Circuit, July 26, 2010) A-2

ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT, *Day v. Apoliona*, Civ. No. 05-00649 (D.Haw, June 20, 2008) . . A-21

Excerpt from Deposition of Clyde Namuo, May 8, 2008, pages 8-12 . . . . . A-50

Cases cited:

Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007) . . . 5

Day v. Apoliona, 505 F.3d 963 (9th Cir. 2007) . . . 12

Day v. Apoliona, 616 F3d 918 (9th Cir. 2010) 5

Day v. Apoliona, Civil No. Civ. No. 05-00649 1

OHA v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) 16

Rice v. Cayetano, 528 U.S 495 (2000) 16, 17, 22

State v. Zimring, 58 Haw. 106 (1977) 10

Thurston v. Bishop, 7 Haw. 421, 430 (1888) 11

Constitutional provisions cited:

Haw. Const., Art. XII, §4 . . . . . 17, 22

Haw. Const., Art. XII, § 5 . . . . . 17, 22

Haw.Const., Art. XII, § 6 . . . . . 6, 19

Statutes cited:

25 U.S.C. § 479 . . . . . 6, 22

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 . . . . . 17, 22

42 U.S.C. § 1983 . . . . . 17, 22

H.R.S. § 10-3 . . . . . 16, 17

H.R.S. § 10-6(a)(8) 10, 19

H.R.S. § 673-1(b)(1) 11

Pub. L. No. 67-34, 42 Stat. 108 (1921) . . . . . passim

Pub. L. No. 67-34, 42 Stat. 108 § 201(a)(7) (1921) 4,5

Pub. L. No. 67-34, 42 Stat. 108 § 207(a) (1921) . . . 16

Pub. L. No. 86-3, 73 Stat. 4 § (4) (1959) . . 2, 5, 16, 22

Pub. L. No. 86-3, 73 Stat. 4 § 5(b) (1959) 3, 13-14, 19

Pub. L. No. 86-3, 73 Stat. 4 § 5(f) (1959) . . 4, 6-8, 14-18, 22-23

Rules cited:

Supreme Court Rule 10(a) 23

Supreme Court Rule, 10(c) 23

Treatises cited:

Restatement (Third) of Trusts, § 87 8

Other authorities cited:

Cannelora, Louis, "The Origin of Hawaii Land Titles and of the Rights of Native Tenants", Security Title Corp., Honolulu, Hawaii (1974) 10, 11

Chinen, Jon Jitsuzo, "Original Land Titles in Hawaii", Library of Congress No. 61-17314 (1961) 10

Dept. of Hawaiian Home Lands, Annual Report, 2004 12

Federal-State Task Force on the Hawaiian Homes Commission Act Report to the Secretary of the Interior and the Gover-

nor of the State of Hawaii, Honolulu, 1983 ..... 12, 14

Native Hawaiian Data Book, 1998, Office of Hawaiian Affairs, Honolulu (1998) 10

Op. Haw. Att'y Gen. 83-2 (Apr. 15, 1983) 17

Resolution No. 55, 55th Congress; 30 Stat. at L. 750 (July 7, 1898). 14

Uychara, Mitsuo, *Hawaii Ceded Lands*, Hawaiiana Almanac Publishing Co., Honolulu, 1977 ..... 11, 15

In the Supreme Court of the United States

VIRGIL E. DAY, *et al.*

Petitioners,

v.

HAUNANI APOLIONA, *et al.*

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, VIRGIL E. DAY, JOSIAH L. HOOHULI, PATRICK L. KAHAWAIOLAA, and SAMUEL L. KEALOHA, JR., respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS IN THE CASE

The opinion of the Ninth Circuit Court of Appeals sought to be reviewed was filed July 26, 2010, in *Day v. Apoliona*, 616 F3d 918 (9th Cir. 2010) (*Day III*). This opinion is reprinted in the Appendix at page A-2. The unpublished ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT, filed in the U.S. District Court for the District of Hawaii, in *Day v. Apoliona*, Civil No. Civ. No. 05-00649 SOM/BMK, on June 6, 2008, is reprinted in the Appendix at page A-21.

JURISDICTION

This is a petition for writ of certiorari directed to the U.S. Court of Appeals for the Ninth Circuit to review the judgment filed and entered on July 26, 2010, in *Day v. Apoliona*, C.A. No. 08-16704. This Honorable Court has discretionary jurisdiction to review cases in United States Courts of Appeals by way of writ of certiorari as provided by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Admission Act, § 4

§4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.
Pub. L. No. 86-3, 73 Stat. 4 § (4) (1959)

Admission Act § 5(b)

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.
Pub. L. No. 86-3, 73 Stat. 4 § 5(b) (1959).

Admission Act § 5(f)

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit

may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.
Pub. L. No. 86-3, 73 Stat. 4 § 5(f) (1959).

Hawaiian Homes Commission Act, § 201(a)(7)

(a) That when used in this Title: . . . (7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.
Pub. L. No. 67-34, 42 Stat. 108 § 201(a)(7) (1921).

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
42 U.S.C. § 1983.

STATEMENT OF THE CASE

This is a civil rights case pursuant to 42 U.S.C. § 1983 by native Hawaiian[1] beneficiaries of the compact and trust established by § 4 and § 5(f), respectively of the Hawaii Admission Act. The complaint alleges that defendant Trustees of the Office of Hawaiian Affairs (OHA) expended trust funds without regard to the blood quantum established by § 201(a)(7) of the Hawaiian Homes Commission Act, 1920. The complaint seeks declaratory and injunctive relief and damages.

In particular, the complaint alleges that OHA expended trust funds to support a bill, commonly known as the "Akaka Bill," to establish a Native Hawaiian Governing Entity. Native Hawaiian Government Reorganization Act of 2005, S. 147, 109th Cong. (2005). Which bill and its predecessors defined the term "Native Hawaiian" as persons descended from the aboriginal inhabitants of the Hawaiian Islands without regard to blood quantum.[2] The complaint further alleges that OHA contributed trust funds to three social service agencies, the Native Hawaiian Legal Corporation, Alu Like and Na Pua No'eau Education Program, which provide benefits to Hawaiians without

---

[1] As used herein, the term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. The term "Hawaiian," when used as a noun referring to a person or persons, means any such descendant without regard to blood quantum.

[2] The bill discussed by the Court of Appeals was a later version resubmitted in the 110th Congress as Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007). That bill contains the same definition of "Native Hawaiian." The bill was completely rewritten as H.R. 2314, which was passed by the House on February 23, 2010. This latest version of the bill does not contain a definition of "Native Hawaiian."

regard to blood quantum.

Jurisdiction of the U.S. District Court was invoked pursuant to 28 U.S.C. § 1343 or, alternatively, pursuant to 28 U.S.C. § 1331.

The State of Hawaii filed an amicus brief suggesting that Petitioners lacked standing to bring suit. The District Court agreed and dismissed the case. On appeal, the Ninth Circuit Court of Appeals reversed and remanded. *Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007) (*Day I*). The State's motion to intervene to file a motion for rehearing and rehearing *en banc* was granted. *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (*Day II*). The motion for rehearing was denied.

On remand, OHA moved for summary judgment. OHA admitted that they were using § 5(f) trust funds to support the Akaka Bill and the three service agencies. It was also undisputed that the service agencies provide benefits to Hawaiians without regard to blood quantum. OHA claimed, however, that it had discretion under the trust to make expenditures for these purposes. The District Court agreed and again dismissed the case.

The District Court concluded preliminarily that OHA was not limited by federal law in its use of trust funds to the betterment of the conditions of native Hawaiians. Expenditures could be justified under any one of the five § 5(f) trust purposes.

With respect to the Alu Like expenditures, the District Court noted that Alu Like provides social services to Hawaiians without regard to blood quantum as follows:

> Alu Like is a nonprofit organization that strives to help Hawaiians and native Hawaiians achieve social and economic self-sufficiency through the provision of early childhood education and child care, elderly services, employment preparation and

training, library and genealogy services, specialized services for at-risk youth, and information and referral services.

A-45.

In view of these functions, the District Court concluded that OHA has discretion to contribute 5(f) trust funds to Alu Like under the first two of five trust purposes—supporting public schools or bettering the conditions of native Hawaiians.

The other challenged expenditures were similarly justified by the District Court. A-40-44. The Court also dismissed Petitioners claims for injunctive and declaratory relief, granting judgment in favor of OHA on all claims. A-46-48.

The State moved for summary judgment on the grounds that OHA's expenditures are not limited by the trust because the State spends more on the public schools than the income generated from the trust. The District Court did not address this issue as it was rendered moot by ruling on OHA's motion.

On appeal, Petitioners argued that state law is incorporated into § 5(f) by the language "in such manner as the constitution and laws of said State may provide" and that state law clearly limits OHA expenditures to the single purpose of the betterment of the conditions of native Hawaiians, as defined in HHCA.

Petitioners argued further that expenditure of trust funds for the benefit of Hawaiians without regard to the blood quantum was a common law breach of the duty of loyalty to the native Hawaiian beneficiaries.

Alternatively, even if OHA was permitted to expend trust funds for any one of the five trust purposes, Petitioners argued that the record, consisting only of the agency contracts allowing multiple uses some of which are permitted uses and some not, did not establish that the expenditures were actually for permitted

uses.

Finally, Petitioners argued that, to the extent that the law is unclear, they were entitled to declaratory relief establishing the extent to which trust funds can be used to provide benefits to Hawaiians not meeting the blood quantum, to wit: "so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries." See H.R.S. § 673-1(b)(1).

During oral argument, counsel for OHA and the state both admitted that under state law, OHA is restricted to using § 5(f) funds solely for the betterment of the conditions of native Hawaiians. OHA argued that, even so, they had discretion to determine that providing benefits to all Hawaiians would better the conditions of native Hawaiians. The Court of Appeals agreed.

The Court of Appeals held preliminarily that, under federal law, OHA may use § 5(f) trust funds for any one of the five enumerated purposes, as follows:

> First, the only "breach of trust" § 5(f) refers to is "use" of funds "for any other *object*," referring to the enumerated spending purposes. *Id.* (emphasis added). It does not encompass any other restrictions under state law. Second, we find it implausible that Congress gave Hawaii discretion to choose how to manage the trust yet provided for federal intervention to enforce those choices, whatever they might be.

A-11.

Addressing the specific challenged expenses, the Court of Appeals applied the common law of trusts, specifically Restatement (Third) of Trusts, § 87, to conclude that OHA has broad discretion to determine how to use the trust funds which will not be disturbed absent an abuse thereof. The Court held that its only

function, therefore, was to "examine the challenged expenditures to determine whether any of them is beyond the bounds of a trustee's reasonable judgment that the project in question would serve § 5(f) trust purposes." A-14.

Applying these standards to the challenged expenditures, the Court concluded that all were well within OHA's reasonable judgment. In particular with respect to contributions to Alu Like, the Court of Appeals rejected the District Court's conclusion that it could be justified under the support of the public schools purposes, but that it was justified under the betterment of the conditions of native Hawaiians purpose, as follows:

> Finally, the OHA trustees had discretion to fund the Alu Like contract. That contract obligates Alu Like to provide "a comprehensive system for beneficiaries [including native Hawaiians and Hawaiians] to receive information, referrals, . . . case management, personal financial management, and emergency fund assistance" consistent with a proposal that Alu Like submitted to OHA. As the district court found, the trustees could have reasonably determined that the conditionss of native Hawaiians would benefit from Alu Like's efforts to "help [ ] Hawaiians and native Hawaiians achieve social and economic self-sufficiency."

A-17-18.

This holding, in essence, allows the expenditure of § 5(f) trust funds to better the conditions of Hawaiians, without regard to blood quantum.

The Court rejected the State's argument that its expenditures for public schools free OHA from the trust use restrictions. A-18-19.

REASONS FOR ALLOWANCE OF THE WRIT

A. How the native Hawaiians lost their land.

In 1778, upon arrival of Capt. James Cook in the Sandwich Islands the native Hawaiian population exceeded 300,000. *Native Hawaiian Data Book, 1998*, Office of Hawaiian Affairs, Honolulu (1998), Table 1.1. At that time, it has been suggested that land ownership was under a feudal type of system, in which all of the land was owned by the King and granted by him to his chiefs known as *konohikis*, and by them, in turn, to tenant farmers. See Chinen, Jon Jitsuzo, "Original Land Titles in Hawaii", Library of Congress No. 61-17314 (1961), p. 1; Cannelora, Louis, "The Origin of Hawaii Land Titles and of the Rights of Native Tenants", Security Title Corp., Honolulu, Hawaii (1974), p. 1. But more properly, it was in the nature of a trust with the King as trustee and the *konohikis* and native tenants as beneficiaries. This was recognized in the first Constitution of the Kingdom of Hawaii adopted in 1840. As provided therein:

> "Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I was the head, and had the management of landed property."

State v. Zimring, 58 Haw. 106, 111 (1977) quoting *Fundamental Law of Hawaii* (1904) at 3 quoting The Constitution of 1840.

On December 10, 1845, the Board of Commissioners to Quiet Land Titles, commonly known as the Land Commission was established to adjudicate and settle disputes over titles of real property. Cannelora, supra, p. 7. It was recognized in the Principals of the Land Commission as well as the Privy Counsel that the

ownership of the land at that time was held in equal one-third undivided interests by the King, the *konohiki* landlords and the tenants living on the land. Cannelora, supra, pp. 10, 12. *See also Thurston v. Bishop*, 7 Haw. 421, 430 (1888).

The problem was that the Land Commission had no means to divide these interests, so that fee simple ownership of land could not be obtained unless all of these parties joined in the deed. In order to solve this problem, Kamehameha III and the *konohikis* divided their lands between themselves in what is known as The Great Mahele. This was actually a series of divisions between the king and *konohikis* made between January 27, 1848 and March 7, 1848, which allowed the *konohiki* to take his or her claim to the Land Commission and obtain fee title *subject to the rights of the native tenants*. Cannelora, supra, p. 13.

Native tenants were not able to obtain fee title to their interests until 1850, when legislation was enacted allowing them to present *kuleana* claims to the Land Commission. Cannelora, supra, 17-19. But the law did not favor the granting of such claims. First, native tenants were less well educated and less informed than the *konohiki* class and may not have been aware of their right to obtain title or the means to perfect it. Second, native tenants were given only a 4 and one-half year period within which to file their claims after which they were forever barred, while *konohikis* were given up to 49 years to file. Cannelora, supra, p. 19. Third, native tenants were required to incur the considerable expense of a survey of their claim, while *konohikis* were not. *Id.* Ultimately, only 28,658 acres were awarded to native Hawaiian tenants out of the 4.1 million acres of land in Hawaii. Uyehara, Mitsuo, *Hawaii Ceded Lands*, Hawaiiana Almanac Publishing Co., Honolulu, 1977, p. 19.

Thus, this legislation purportedly to allow native tenants to obtain fee simple title to their land actually operated to extinguish the claims of the vast majority of native Hawaiian people who failed to go through the process of surveying and registering *kuleana* claims. Whereas before the *mehele*, native Hawaiian tenants owned an undivided one-third interest in the entire 4.1 million acres of land, after the *mehele* only a small number of them owned 28,658 acres, in fee simple, while the government held title to the land free and clear of any further *kuleana* claims. Upon annexation, the United States succeeded to ownership of 1.8 million acres of government land, a one-third interest in which had once been owned by the native Hawaiian tenants.

B. Hawaiian Homes Commission Act, 1920

It was the decline in population and loss of land by the native Hawaiian people that Congress purportedly sought to address when it enacted HHCA. The act provided that approximately 200,000 acres of land be set aside and designated as "available lands" to be awarded to native Hawaiians as 99-year leasehold homesteads pursuant to HHCA, § 207(a).

Unfortunately, the Hawaiian Homes Commission was only given a revolving fund of $2 million to work with. As a result by 1938, only 750 homestead leases had been awarded under the HHCA, representing about 10 per cent of the eligible beneficiaries. *Federal-State Task Force on the Hawaiian Homes Commission Act Report to the Secretary of the Interior and the Governor of the State of Hawaii*, Honolulu, 1983 ("Task Force"), pp. 141-2. Some allowance may be made for startup time. However, the rate of awarding leases did not pick up significantly over the succeeding years. As of June, 2004, the total number of homestead leases was 7418. Dept. of Hawaiian Home Lands, Annual

Report, 2004, p. 12. While DHHL has increased the rate of homestead awards since 2004, as of December 31, 2009, there remained a total of 25,244 individuals on homestead waiting lists. http://hawaii.gov/dhhl/application-wait-list/12-31-09/2009-12-31_07-Alpha_A-K_Waitlist_245pgs.pdf, p. 5.

C. Statehood.

Upon admission into the union, Hawaii received an extraordinary grant of nearly all of the public land within the state. Admission Act, supra, § 5(b). This grant was considerably more than the other 49 states which had received only one to four sections per township for support of the public schools. However, this grant was made upon the express condition, not imposed upon other states, that Hawaii would assume the role of the federal government of dealing with the particular needs of the native people. Admission Act, §§ 4 and 5(f). The legislative history of the Admission Act makes it clear that this was the intent of Congress.

Early versions of the statehood bill included provisions that the new state would succeed to title to all of the public land not then actually being used by the federal government. This idea derived from a provision of the Newlands Resolution of annexation, as follows:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educa-

tional and other public purposes.
Resolution No. 55, 55th Congress; 30 Stat. at L. 750 (July 7, 1898).

Based on this provision, the proponents of statehood considered that all of the public land should be conveyed to the state upon admission. This also might have been justified by the fact that the land might be much more efficiently managed from Honolulu than from the Department of the Interior, 4,000 miles and half an ocean away.

Inasmuch as this grant would have included the home lands, early statehood bills included provisions for adoption of HHCA as state law similar to provisions now found in § 4 of the Admission Act. Notably, such provisions omited the requirement that all proceeds and income from the home lands be used to implement the Act. See, e.g., Task Force, supra, pp. 146-7 (H.R. 49, 80th Cong., (1947)).

The Secretary of the Interior objected to this disposition of the public lands. The Secretary argued that, upon statehood, the federal government should maintain control and management of the public lands with Hawaii being given only 180,000 acres (one-tenth). This would have been consistent with all other states receiving between one-eighteenth and one-ninth of the public land in trust to support the public schools and provide public improvements. *Id.*, pp. 147-8 (H. Rept. 194 on H.R. 49, p. 16).

Eventually, Congress compromised. All of the land not being used by the federal government—1.4 million acres, including the home lands—was granted to the state, subject to the § 5(f) trust and § 4 compact. In this manner, Congress delegated to the State of Hawaii, the obligation to deal with native Hawaiian claims.

The clause for the betterment of the conditions of native Hawaiians in Section 5(f) of the Admission

> Act indicates that Congress foresaw the emergent demands of native Hawaiians for reparation or settlement of their claims. In the Indian Claims Commission Act (1946) [Indian Claims Commission Act, Act of August 13, 1946, c. 959, Sec. 1, 60 Stat 1049, 25 U.S.C.A. Sec 70] and the Alaska Native Claims Settlement Act (1971) [Alaska Native Claims Act, Act of September 18, 1971, Public Law 92-203, 85 Stat 668, 43 U.S.C. §§1601-1624.] Congress had provided for direct settlement with the people affected. In the case of Hawaii, Congress can be said to have delegated the task to the State legislature under Section 5(f) of the Admission Act. It is to be noted that the language of Section 5(f) trust was first incorporated into the Hawaii Statehood bill in 1947, just a few months after the enactment of the Indian Claims Commission Act in 1946.

Uyehara, supra, p. 15.

D. The Oha fraud.

For twenty years after statehood, little was done for the betterment of the conditions of native Hawaiians. The State commingled § 5(f) income and proceeds with income and proceeds from other public lands, then, relying upon the "one or more of the foregoing purposes" language in § 5(f), transferred these proceeds to the Department of Education and then transferred an equal amount from the DOE to the general fund. *Id.*, pp. 6-9. By use of this money-laundering practice, the State was actually using the § 5(f) income and proceeds for general operation of the government, not even for the support of the public schools.

Eventually, native Hawaiian beneficiaries began to organize in protest of the State's egregious breach of the § 5(f) trust. *See Id.*, p. 15. The issue was purport-

edly addressed in the 1978 Constitutional Convention by the establishment of OHA. OHA was purportedly established to address prior abuse and neglect of native Hawaiian beneficiaries. See *OHA v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987).

In practice, however, OHA seems to have been the foundation of a State strategy to to shift the native Hawaiian problem back to the federal government. The first step of which was to increase the number of beneficiaries to increase the amount of their political pressure. The second step was to divert § 5(f) funds from the intended purpose of implementing HHCA. The third step was to convince Congress that the federal government was responsible for the plight of the beneficiaries. The final step was to create an entity that had authority to negotiate a settlement of native Hawaiian claims that would release the State from the § 4 and § 5(f) obligations in exchange for lands contributed to it by the state and federal governments.

1. Increase the number of beneficiaries.

There are less than 80,000 native Hawaiian beneficiaries of the § 5(f) trust. See *Rice v. Cayetano,* 528 U.S 495, 526 (2000) [Breyer, J., concurring]. This number will decrease over time through intermarriage. Having given Hawaii ten times a much public land as other states got for the support of the public schools, Congress had given Hawaii ample resources to provide homesteads and other benefits for the diminishing number native Hawaiians.

On the other hand, there are more than 130,000 Hawaiians who do not meet the one-half part blood quantum ("toenail Hawaiians"). *Id.* The number of toenail Hawaiians will continually increase through intermarriage. Given enough time and intermarriage, everyone in the world will be a toenail Hawaiian and

there will be no more native Hawaiians.

From its initial conception, OHA was designed to break the blood quantum and exponentially increase the number of beneficiaries. OHA was charged with the responsibility of bettering the conditions of native Hawaiians as well as all toenail Hawaiians. Haw. Const., Art. XII, §§ 4 and 5; H.R.S. §§ 10-3(1) and (2).

To make matters worse, the constitutional amendments made provision for funding OHA with a pro rata portion of the income and proceeds of the § 5(f) trust [excluding the home lands portion] while making no provision for funding for toenail Hawaiians. Haw.Const., Art. XII, §§ 4 and 6. To make matters still worse, the legislature provided for the election of OHA trustees by Hawaiians without regard to blood quantum. See *Rice v. Cayetano, supra.*

Even when OHA was first established the number of toenail Hawaiians was greater than the number of native Hawaiians. So making OHA responsible for bettering the conditions of all Hawaiians and having them be elected by all Hawaiians created a conflict of interest situation in which OHA trustees would naturally be looking to curry favor with the toenail Hawaiians.

Immediately after its formation, OHA trustees sought to use § 5(f) trust funds for the benefit of toenail Hawaiians. The Hawaii Attorney General advised them not only that they could not do so, but that any purported authorization by the state legislature would violate § 5(f). See Op. Haw. Att'y Gen. 83-2 (Apr. 15, 1983).

2. Diversion and withholding of funds intended for homestead development.

The next step in the strategy was exacerbate the need of the native Hawaiian beneficiaries by withhold-

ing and diverting resources that Congress intended for their use and benefit. By allocating a pro rata portion of the income and proceeds from the § 5(f) trust to OHA instead of to the Dept. of Hawaiian Home Lands, the amount of funding for the implementation of HHCA was thereby reduced. Over the years, OHA has used only a small portion of its trust income for the betterment of the conditions of native Hawaiians. Instead, OHA has invested and reinvested the trust funds in an investment portfolio that had reached $409 million as of May 8, 2008. A-51. The OHA administrator, Clyde Namuo, did not even know whether or not that fund was part trust corpus limited to the uses and purposes of § 5(f). A-50-53.

When additional federal funds are received by DHHL for homestead development, they are not used to provide homesteads for the homeless. In one case $25 million in federal funding was given to a subsidiary of Kamehameha Schools, Bishop Estate to construct homes on home lands. Honolulu *Star-Bulletin*, October 16, 1998, p. 3. The leasehold homes were then *sold* to beneficiaries for about the same amount of money beneficiaries could have purchased a fee simple home in Kapolei, where developers have to purchase the land as part of their cost. This project provided significant profit to a subsidiary of KSBE, which has a $10 billion endowment of its own, but little benefit to the actual beneficiaries and no benefit to beneficiaries who could not afford to purchase a home.

3. Federal funding.

The third step was to ask Congress for funding for Hawaiians on the grounds that the state had been unfairly burdened with the obligation of providing for such a large number of indigenous people and had not been provided with adequate resources to do so. This is

foreshadowed by the 1978 constitutional amendments and legislation establishing OHA. In § 6 of Article XII of the Constitution, OHA is given the task of exercising control over property transferred by the *federal government* for "native Hawaiians and Hawaiians." Pursuant thereto, the legislature authorized and directed OHA:

> To apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians;

H.R.S. § 10-6(a)(8).

In August, 1989, the Senate Committee on Indian Affairs and the House Committee on Interior and Insular Affairs held five days of joint hearings on the Administration of the Native Hawaiian Home Lands. S.Hrg. 101-555, 101st Cong. The five volume Report contains a long litany of complaints by beneficiaries of abuse and neglect. However, much of the time was allocated to state officials attempting to justify additional federal funding for the homestead program.

Gov. John Waihee's opening remarks set the tone. S.Hrg. 101-555, v. 1, pp. 11-13. Mr. Waihee suggests that "The Federal Government did not provide the best lands nor the most adequate resources for the development of those lands." This is nonsense, since § 5(b) grants the state *all of the public land* except that which the federal government was actually using. That is, essentially, all except the National Parks and military bases which are maintained at considerable expense by the federal government to serve and protect the general public. These expenditures by the federal government actually generate revenue for the state through taxes generated by increased tourism and economic activity.

Mr. Waihee then claims there are 200,000 Hawaiian people in the state. This ignores the blood quantum. In

fact, there are less than 80,000 native Hawaiians who are eligible for homestead awards, approximately 25,000 of whom were on the waiting lists at the time. He then suggests that Hawaiians benefit more than other ethnic groups from public education and welfare benefits and then concludes that the state cannot provide these things without federal assistance, as follows:

> Hawaiians depend on public education. The extent to which we are successful in our education reform efforts is the extent to which we will benefit Hawaiians, as well as every other student in our public school system. And if the Federal Government and the State are truly committed to the goal of individual and family self-sufficiency, then the welfare reform effort will benefit Hawaiians.
>
> Indeed, a conservative estimate prepared by the State's Department of Budget and Finance indicates that for fiscal year 1990 we will spend $285 million for Hawaiians.
>
> The State cannot be alone in our efforts to provide both general purpose and targeted programs for Hawaiians and all of our citizens. State directors and other witnesses will identify a number of areas in which new Federal dollars will make significant differences, especially if they are combined with existing State and private initiatives.

S.Hrg. 101-555, v. 1, p. 12.

Mr. Waihee claims that the state endeavors to enforce Kamehmeha I's Law of the Splintered Paddle, "Let every elderly person, woman and child lie by the roadside in safety." Nothing could be further from the truth. In fact, all too often, state law enforcement officers are sent out in military array to evict or arrest large groups of homeless native Hawaiians living in tents on beaches or in public parks. As recently as

July, 2010, 350 homeless people were evicted from a tent camp on a beach in Waianae. One of these people later committed suicide. http://www.thehawaiiindependent.com/story/faced-with-eviction/. This suicide was not even reported in the Honolulu *Star-Advertiser*. It seems that native Hawaiians do NOT have the right in Hawaii to lie homeless by the roadside in safety. They are bad for tourism.

During the testimony of Hawaiian Homes Commission Chairperson, Ilima Pi'ianaia, in the August, 1989 joint hearings, she thanked Senator Inouye for making federal funds available for the Hawaiian Homes program for the first time and then asked for an additional $500 million. S. Hrg. 101-555, v. 1, p. 70.

4. The Akaka bill.

This bill will create a governing entity made up of Hawaiians without regard to blood quantum in which toenail Hawaiians outnumber native Hawaiians. While the present bill does not define "Native Hawaiian" at all, it does contain a complex six-page definition of a "Qualified Native Hawaiian Constituent." H.R. 2314, § 3(12). These are the people who will be organizing the Native Hawaiian Governing Entity. This definition basically includes anyone who the Commission finds is an 18 year-old, U.S. citizen, descendant of an aboriginal Hawaiian without regard to blood quantum, with some exceptions for out-of-state residents. The individual seeking to participate in this process must be willing to certify that he or she meets these qualifications.

As noted above, the number of toenail Hawaiians who meet this definition is greater than the number of native Hawaiian. In addition, the requirement that the person certify that he is a U.S. citizen will exclude a significant number of native Hawaiians who claim

sovereignty and do not acknowledge U.S. citizenship. This requirement is similar to the loyalty oath that the Republic of Hawaii used to disenfranchise native Hawaiians. This requirement will tend to increase the influence of toenail Hawaiians in the organization of the Entity.

The lack of a blood quantum is in conflict with federal Indian law which generally imposes a not less than one-half part blood quantum on individuals seeking to reorganize Indian tribes. 25 U.S.C. § 479 (one-half part blood quantum for Indians not living on a reservation). Lack of a blood-quantum may also render the Akaka bill unconstitutional. See *Rice v. Cayetano, supra.*

The purpose of allowing toenail Hawaiians to organize the Entity will assure that there will be no blood quantum for membership in the Entity itself. Why would a toenail Hawaiian vote to exclude himself from membership in the Entity?

The State will then be able to offer to transfer the home lands and OHA investment portfolio to the Entity in exchange for a release of its trust obligations under §§ 4 and 5(f). Naturally, native Hawaiians would oppose such an arrangement, but they will likely be outvoted by toenail Hawaiians.

E. The Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

This case arises out of a trust consisting of public land within the State of Hawaii. Except with respect to a suit against federal officials to compel enforcement thereof[3], these cases will only be decided in the Ninth

---

[3] In *The Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1999), the Ninth Circuit held that federal officials have sovereign

(continued...)

Circuit Court of Appeals. Therefore, certiorari cannot be based upon a conflict between the Circuits under Supreme Court Rule 10(a).

The Court of Appeals has held that OHA can expend § 5(f) trust funds for the betterment of the conditions of Hawaiians without regard to blood quantum. This is an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule, 10(c).

Dated: Honolulu, Hawaii, October 25, 2010.

Respectfully submitted,
Walter R. Schoettle
Counsel of record
P. O. Box 596
Honolulu, Hawaii 96809
Attorney for Petitioners

---

[3](...continued)
immunity from a suit for mandamus to enforce the terms of the trust.

APPENDIX

TABLE OF CONTENTS (APPENDIX)

OPINION, *Day v. Apoliona*, CA No. 08-16704 (Ninth Circuit, July 26, 2010) A-2

ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT, *Day v. Apoliona*, Civ. No. 05-00649 (D.Haw, June 20, 2008) A-21

Deposition of Clyde Namuo, May 8, 2008, pages 8-12 ..... A-50

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-16704

VIRGIL E. DAY, *et al.*, *Plaintiffs-Appellants*,

vs.

HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs, *et al.*, *Defendants-Appellees*,

STATE OF HAWAII, *Intervenor-Defendant-Appellee*.

Filed July 26, 2010

OPINION

FISHER, Circuit Judge:

Plaintiffs are "native Hawaiians," defined in section 201(a) of the Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921) ("HHCA"), to mean "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[1] As such they are beneficiaries of a "public trust" created in the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) ("Admission Act"). They contend that the trustees of the Office of Hawaiian Affairs ("OHA"), a Hawaii state agency that administers a portion of the public trust's proceeds, breached the trust. Plaintiffs appeal from the district court's grant of summary judgment to the OHA trustees. We

---

[1] We use the term "native Hawaiian" in this way throughout the opinion. By contrast, we use the term "Hawaiian" to include any descendant of the indigenous peoples of the islands of Hawaii, regardless of proportional ancestry. Cf. Haw. Rev. Stat. § 10-2.

have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND

A. The § 5(f) Trust

The Admission Act granted to the State of Hawaii title to most of the federal government's public land within the state. *Id.* § 5(b)-(e), 73 Stat. at 5-6. Section 5(f) of the Admission Act requires the state to hold much of that land and profits from it in "public trust" (the "§ 5(f) trust") for five enumerated purposes. *Id.* § 5(f), 73 Stat. at 6. One such purpose is "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act." *Id.* The other purposes — for public schools, development of farm and home ownership, public improvements and the provision of land for public use — are not limited to native Hawaiians. *Id.* After setting forth these purposes, § 5(f) further specifies that the trust "shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust." *Id.* Hawaii has provided that a portion of the § 5(f) trust's proceeds shall be administered by OHA.

B. OHA's Portion of the § 5(f) Trust

OHA is a Hawaii state agency that administers a portion of the § 5(f) trust's proceeds as well as some other funds. See generally Haw. Rev. Stat. ch. 10. In particular, state law entitles OHA to receive "[t]wenty per cent of all funds derived from" the § 5(f) trust, Haw. Rev. Stat. §§ 10-3, 10-13.5, and requires this portion of the § 5(f) trust's proceeds to "be held and used [by OHA] solely as a public trust for the betterment of the

conditions of native Hawaiians." *Id.* § 10-3.[2] State law thus appears to limit OHA's uses of § 5(f) trust proceeds to only one of the five purposes enumerated in the federal statute. *See Day v. Apoliona*, 496 F.3d 1027, 1029 (9th Cir. 2007) ("*Day I*") ("OHA receives a portion of the § 5(f) trust monies, which it is to devote 'to the betterment of the conditions of [n]ative Hawaiians.' " (quoting Haw. Rev. Stat. § 10-3)).

C. The Challenged Expenditures

Plaintiffs challenge four projects on which the OHA trustees have spent parts of its 20-percent share of the § 5(f) trust's proceeds.

1. **The Akaka Bill.** OHA used § 5(f) trust money to lobby for and support the proposed Native Hawaiian Government Reorganization Act of 2007, commonly referred to as the "Akaka Bill" after Senator Daniel Akaka of Hawaii, one of its chief proponents. The Akaka Bill would create a process through which the United States could recognize a governing entity for Hawaii's indigenous people. See Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007). The governing entity would have the power to establish its own criteria for citizenship. *Id.* § 7(c)(2)(B)(iii)(I)(aa). Initially, however, it would be governed by an "interim governing council," *id.* § 7(c)(2)(A), to be elected by "adult members of the Native Hawaiian community who elect to participate

---

[2] Under state law, OHA's authority to use § 5(f) trust funds is also narrower than OHA's general authority, which includes promoting "the betterment of the conditions of native Hawaiians . . . [and] Hawaiians." Haw. Rev. Stat. § 10-3 (emphasis added); see also *id.* § 10-2 (defining "native Hawaiian" and "Hawaiian").

in the reorganization of the Native Hawaiian governing entity and are certified to be Native Hawaiian," *id.* § 7(c)(1)(A). For the purposes of the Akaka Bill, the term "Native Hawaiian" includes (essentially) any direct descendant of the indigenous people of Hawaii. *Id.* § 3(10). This definition is broader than the class of "native Hawaiians" (like plaintiffs) comprised only of individuals with "not less than one-half part" indigenous Hawaiian lineage. See HHCA § 201(a).

The Akaka Bill would expressly empower both the United States government and the State of Hawaii to negotiate and enter agreements with the Native Hawaiian governing entity regarding "the transfer of lands, natural resources, and other assets, and the protection of existing rights related to such lands or resources" and "the exercise of governmental authority over any transferred lands, natural resources, and other assets, including land use." Akaka Bill § 8(b)(1)(A)-(B).

2. Native Hawaiian Legal Corporation ("NHLC"). NHLC identifies itself as "a non-profit corporation that specializes in Hawaiian land and Hawaiian rights issues." OHA used § 5(f) trust money to fund a contract with NHLC, under which NHLC agrees to render a range of legal services including "[a]ssertion and defense of quiet title actions," protection of water rights, "[p]reservation of Native Hawaiian Land Trust entitlements" and preservation of traditional practices and culturally significant places. The contract does not restrict NHLC to providing legal services to "native Hawaiians." Its recitals explain that OHA "has established a program whereby all Hawaiians can receive" certain legal services and that "the program is intended to better the conditions of all Hawaiians." In

addition, the contract defines "Hawaiian" to include not only "native Hawaiians" under the HHCA (like plaintiffs) but also any descendant of the aboriginal peoples inhabiting the Hawaiian islands in 1778, without regard to proportional ancestry.

3. Na Pua No'eau Education Program ("Na Pua"). Na Pua identifies itself as "a Hawaiian Culture-based Education Resource Center within the University of Hawaii . . . that provides educational enrichment program activities to Hawaiian children and their families." OHA used § 5(f) trust money to fund a contract with Na Pua. Na Pua does not appear to restrict the services it provides under the contract to "native Hawaiians" either generally or under the OHA contract.

4. Alu Like, Inc. Alu Like is a nonprofit service organization that strives to help Hawaiians achieve social and economic self-sufficiency by providing early childhood education, services to the elderly, employment preparation and training, library and genealogy services, specialized services for at-risk youth and information and referral services. OHA used § 5(f) trust money to fund a contract with Alu Like. Alu Like does not appear to restrict its services to "native Hawaiians" either generally or under the OHA contract.

D. Procedural History

Plaintiffs originally challenged these four OHA expenditures as a violation of (1) Admission Act § 5(f), enforceable under 42 U.S.C. § 1983; (2) the Equal Protection Clause of the Fourteenth Amendment; and (3) a state law duty of fidelity, see Haw. Rev. Stat. § 10-16(c). *See Day I*, 496 F.3d at 1030. The district court dismissed the complaint. *Id.* Plaintiffs did not contest the dismissal of the Equal Protection claims or

the discretionary dismissal of the state law claims, but appealed the court's ruling that they failed to allege any Admission Act § 5(f) violation enforceable under § 1983. *See id.* On appeal we reversed and remanded, holding that "each native Hawaiian plaintiff, as a beneficiary of the trust created by § 5(f), has an individual right to have the trust terms complied with, and therefore can sue under § 1983 for violation of that right." *Id.* at 1039. We left it "to the district court . . . to determine in the first instance not only whether [plaintiffs'] allegations are true, but also whether the described expenditures in fact violate § 5(f)." *Id.*

On remand, the district court entered summary judgment in defendants' favor on the § 1983 claim. It held that each of the challenged expenditures was consistent with at least one of the five trust purposes enumerated in § 5(f). The district court implicitly concluded that the OHA trustees may, as a matter of federal law, spend § 5(f) money for any of the five enumerated purposes, rejecting plaintiffs' argument that federal law requires the OHA trustees to spend the portion of the § 5(f) trust they administer only for one particular § 5(f) purpose, namely the betterment of the conditions of native Hawaiians. The district court further found that the OHA trustees were "simultaneously and redundantly" entitled to qualified immunity because plaintiffs failed to establish any violation of federal law, let alone a clearly established one.

The State of Hawaii participated as amicus curiae in the district court proceedings from an early stage and successfully moved for intervenor status during the first appeal. Hawaii filed an answering brief in this appeal proposing an alternative basis for affirming

summary judgment.[3]

II. STANDARD OF REVIEW

A district court's statutory interpretation is a question of law we review de novo. *See Beeman v. TDI Managed Care Servs.*, 449 F.3d 1035, 1038 (9th Cir. 2006). We also review de novo a district court's grant or denial of summary judgment in a § 1983 action. *See Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 763 (9th Cir. 2006).

III. DISCUSSION

Plaintiffs allege that the OHA trustees have violated plaintiffs' federal rights under § 5(f) and 42 U.S.C. § 1983 by spending trust proceeds for impermissible purposes. In particular, plaintiffs contend they have a federal right, enforceable under § 1983, to require that the trust funds be managed "in such manner as the . . . laws of [Hawaii] may provide," that the laws of Hawaii require the OHA trustees to spend the portion of the § 5(f) funds they manage only "for the betterment of the conditions of native Hawaiians" (and not for any of the other purposes enumerated in § 5(f)) and that the OHA trustees have violated that requirement by spending § 5(f) funds on the four challenged expenditures. In the alternative, plaintiffs argue that, even if there is no violation of federal law so long as OHA trustees spend § 5(f) trust proceeds for any of the

---

[3] Plaintiffs incorrectly contend that Hawaii no longer has intervenor status in this appeal and that its Answering Brief should be stricken. Nothing in the order granting Hawaii's motion to intervene in the previous appeal suggests it was entitled to party status only for a limited purpose. See Day v. Apoliona, 505 F.3d 963, 966 (9th Cir. 2007) ("Day II") ("Hawaii could have and should have intervened earlier . . . .").

five purposes enumerated in § 5(f), these expenditures still demonstrate a breach of trust under federal law. Neither argument has merit.

A. Federal Law Does Not Oblige the OHA Trustees To Use Trust Proceeds Only for Native Hawaiians

The district court implicitly rejected plaintiffs' first argument — that the OHA trustees, as a matter of federal law, must spend the portion of the § 5(f) trust they manage only "for the betterment of the conditions of native Hawaiians." We agree with the district court. Alleged violations of state laws regarding the management and disposition of § 5(f) funds are not necessarily breaches, under federal law, of the § 5(f) trust itself.

[1] Plaintiffs' contrary argument is based on the following text in the statute:

> The [§ 5(f) trust] shall be held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, . . . for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust . . . ."

Admission Act § 5(f).[4] The Admission Act ceded certain property owned by the United States in the former territory of Hawaii to the new State of Hawaii to be held in public trust. See Admission Act § 5(b)-(e). The natural and logical reading of the quoted passage is that Congress, in transferring valuable assets from the United States to Hawaii, wanted to assure that those assets would be used for public benefits as spelled out in the five enumerated purposes. Use for any other purpose would be a breach of trust, a violation of federal dimension. So long as trust funds are used for "one or more" of the enumerated purposes, however, Congress intended to leave the manner in which the trust is managed in Hawaii's sovereign control.

Plaintiffs read the statute not simply as permitting Hawaii to decide, through state law, the manner in which the trust shall be managed, but investing any such discretionary, state provided rules or restrictions

---

[4] In full, this part of the statute ends ". . . use for any other object shall constitute a breach of trust for which suit may be brought by the United States." Admission Act § 5(f) (emphasis added). Our caselaw nonetheless interprets § 5(f) to create a private right of action for a breach of the federal trust. See e.g., Day I, 496 F.3d at 1031-40; Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993); Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467 (9th Cir. 1984). Although recent Supreme Court cases cast some doubt on this holding, we have held that they do not "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), so the holding remains binding on our three-judge panels. See Day I, 496 F.3d at 1034-38 (discussing the effect of recent Supreme Court cases on the private right of action under § 5(f).

with the status of federal law. According to plaintiffs, to the extent Hawaii law restricts the OHA trustees' spending authority over their portion of § 5(f) trust funds to uses benefitting only native Hawaiians, failure to comply with those restrictions violates not just state law but also § 5(f) itself. This construction of the statute does not withstand analysis.

[2] First, the only "breach of trust" § 5(f) refers to is "use" of funds "for any other object," referring to the enumerated spending purposes. *Id.* (emphasis added). It does not encompass any other restrictions under state law. Second, we find it implausible that Congress gave Hawaii discretion to choose how to manage the trust yet provided for federal intervention to enforce those choices, whatever they might be.

[3] Our reading is consistent with several of our cases assuming or suggesting that, as a matter of federal law, the only restriction that the statute places on § 5(f) trustees, including the OHA trustees with respect to the portion of the § 5(f) trust they administer, is that they use trust funds for enumerated purposes. In *Price v. Akaka*, 928 F.2d 824, 826 (9th Cir. 1991) ("*Akaka I*"), we assumed that § 5(f) did not require compliance with state law restrictions on the OHA trustees when we explained that "[t]he fact that the [OHA] trustees may, consistently with § 5(f), spend the income for purposes other than to benefit native Hawaiians does not deprive [native Hawaiian beneficiaries] of standing to [sue under § 1983 for enforcement of the trust conditions]." Similarly in *Price v. Akaka*, 3 F.3d 1220, 1222 n.3 (9th Cir. 1993) ("*Akaka II*"), we treated the question "[w]hether the trustees breached their fiduciary duties under Chapter 10 of the [Hawaii Revised Statutes]" as "a matter of state law

which we do not reach." And when we considered this case in a previous appeal we noted that "neither our prior case law nor our discussion today suggests that as a matter of federal law § 5(f) funds must be used [by OHA trustees] for the benefit of [n]ative Hawaiians or Hawaiians, at the expense of other beneficiaries." *Day I*, 496 F.3d at 1033 n.9 (emphasis added).

[4] Accordingly, we affirm the district court's dismissal of plaintiffs' claims to the extent they contend that the OHA trustees violated federal law by spending for enumerated purposes other than "for the betterment of the conditions of native Hawaiians." So long as OHA trustees spend § 5(f) funds on any of the five enumerated purposes, they have not breached their federal trust obligations.

B. The OHA Trustees Had Discretion To Contribute § 5(f) Trust Funds to the Challenged Projects

Plaintiffs contend in the alternative that, even if OHA trustees may spend for any of the § 5(f) trust purposes, they breached the trust under federal law because each of the challenged projects was not restricted to one or more of the enumerated purposes. This argument is unpersuasive. Although the trustees are obliged to spend only for trust purposes, they have broad discretion to decide how to serve those purposes. The district court properly found that each of the challenged expenditures is sufficiently directed to one or more trust purposes to fall within the range of permissible spending.

1. Legal Standard

[5] We begin with the text of the statute. Section 5(f) of the Admission Act establishes a public trust and the purposes for which it may be used and then pro-

vides an express and narrow enforcement mechanism, specifying that "use for any other object shall constitute a breach of trust." Admission Act § 5(f). To establish a breach of trust under that section, therefore, plaintiffs must prove that trust funds were used for a purpose not enumerated in § 5(f).[5]

The parties dispute what showing is necessary to establish that an expenditure is a "use for any other [nontrust] object." *Id.* To resolve this dispute, we look

---

[5] As a corollary, the Admission Act does not impose upon the trustees all of the obligations trustees may generally be subject to under the common law of trusts. *Cf. Price v. Hawaii*, 921 F.2d 950, 955 (9th Cir. 1990) (holding that the state as manager of a public trust is not "manacle[d]" by "all provisions of the common law of trusts" and therefore is not required to keep trust funds segregated from nontrust funds or to abide by common law prudent-investment requirements); *id.* at 956 (reading the trust so as to "assure that the federal courts will not become involved in the micro management of the government of the State"). As previously noted, § 5(f)'s narrow enforcement mechanism is consistent with the historical context in which the trust was created and with Congress' interest as settlor: to ensure the trust would be used for the enumerated purposes while leaving control of the "manner" of its use to the state. See Admission Act § 5(f). This narrow interpretation of what may constitute a breach of the trust under federal law is also consistent with general trust law principles, which recognize that the inquiry into breach of trust depends in each case on the terms of the trust and the settlor's intent. See Restatement (Third) of Trusts § 50(2) ("[W]hat may constitute an abuse of discretion by the trustee . . . depend[s] on the terms of the discretion . . . and on the settlor's purposes in granting the discretionary power and in creating the trust.") (emphasis added). Although § 5(f) limits the scope of any cause of action for breach of trust under federal law, we express no opinion about the OHA trustees' obligations Hawaii state law may have imposed in regulating the manner in which the trust shall be managed.

to the com
1033-34; A
921 F.2d 9

[6] Ge
except to
terms of t
ciary dutic
a. Because
not direct
discretion
determine
serves one
themselve
discretion
trust purp

[7] "W
the exerci
vision by
Id. § 87. In the context of the narrow federal inquiry into whether an expenditure is a use for a trust purpose, an abuse of discretion occurs when a trustee "has acted unreasonably — that is, beyond the bounds of a reasonable judgment." *Id.* § 87 cmt. c. We therefore examine the challenged expenditures to determine whether any of them is beyond the bounds of a trustee's reasonable judgment that the project in question would serve § 5(f) trust purposes.

Plaintiffs urge that an expenditure is outside the bounds of a reasonable judgment unless it is "in the sole interest of . . . beneficiaries provided that such expenditures may provide a collateral benefit to non-beneficiaries, but only so long as the primary benefits are enjoyed by . . . beneficiaries, and the collateral benefits do not detract from nor reduce the

benefits enjoyed by the . . . beneficiaries." For example, they contend that projects that do not distinguish between "native Hawaiians" and "Hawaiians" cannot be a use "for the betterment of the conditions of native Hawaiians" unless they ultimately direct more dollars or services to native Hawaiians than to others.

[8] We reject such a rule because nothing in the trust's terms or purposes either requires the kind of comparative analysis plaintiffs propose or suggests that Congress intended to prohibit expenditures whose benefits may extend beyond the trust's purposes. Absent express standards, courts apply " 'a general standard of reasonableness' taking account of other terms and purposes of the trust." Restatement (Third) Trusts § 87 cmt. c. Under this standard, although the trustees must reasonably act in pursuit of trust purposes and no others, they are not required to ensure that a given expenditure will provide only "collateral benefits" to nonbeneficiaries or purposes not listed in the trust. *Cf. Akaka II*, 3 F.3d at 1226 (granting OHA trustees qualified immunity where they "reasonably believed that [funding] a referendum to determine Hawaiian opinion" on whether to expand the definition of "native Hawaiian" was for the "betterment of the conditions of native Hawaiians" without any showing that native Hawaiians would benefit more than or differently from non-native Hawaiians). The trustees need only ensure that each expenditure "is one that would . . . be accepted as reasonable by persons of prudence." Restatement (Third) Trusts § 87 cmt. c.

2. Application

Applying this standard, we affirm the district court's grant of summary judgment to the OHA trustees. The district court ably analyzed and rejected

plaintiffs' argument that the challenged expenditures are outside the bounds of a reasonable judgment of a trustee acting to pursue § 5(f)'s purposes.

[9] *Akaka Bill.* The trustees had discretion to use § 5(f) funds to lobby for enactment of the Akaka Bill. Although it is possible that the processes the Akaka Bill envisions could dilute some benefits that native Hawaiians currently enjoy to the exclusion of other Hawaiians, a trustee could reasonably conclude that the bill's benefits to the conditions of native Hawaiians outweigh any drawback and therefore choose to use trust proceeds to support it. *See, e.g.*, Akaka Bill § 7(b)(1)(A), (B), (F) (proposing to authorize the newly formed governing entity to negotiate matters such as the transfer and management of land and natural resources and "grievances regarding assertions of historical wrongs"). As the district court concluded, "[e]ven if the Akaka Bill is intended to benefit Hawaiians in general, the OHA trustees would not be unreasonable or arbitrary in viewing the Akaka Bill as also benefitting native Hawaiians."

[10] *NHLC.* The trustees had discretion to use § 5(f) funds for the NHLC contract. Among the "substantive areas" in which the contract requires NHLC to provide legal representation to Hawaiians is the "[p]reservation and perpetuation of traditional and customary practices [and] [p]rotection of culturally significant places, including burial sites and material culture." Under a general standard of reasonableness, it was within the trustees' broad discretion to determine that expanding the provision of legal services of this kind will "better[ ] . . . the conditions of native

Hawaiians." Admission Act § 5(f).[9]

[11] *Na Pua.* So too was it reasonable for the trustees to fund the Na Pua contract. Na Pua is an educational center within the University of Hawaii, which the parties agree is "a public educational institution." The record shows that OHA gave Na Pua § 5(f) money to provide educational services to Hawaiians that would "connect [their] learning and education to [their] Hawaiian identity." A reasonable trustee could view this contract as serving at least two of the § 5(f) purposes —"support[ing] . . . public schools and other public educational institutions" and "betterment of the conditions of native Hawaiians." Nothing in § 5(f) suggests that it would be unreasonable to consider Na Pua a "public educational institution" even though it serves only Hawaiian students, and a trustee could reasonably believe that native Hawaiians will benefit from additional funding for education directed to Hawaiian culture and identity. As the district court found, "[n]ative Hawaiians stand to benefit if Hawaiian identity in general is preserved and pride in Hawaiian identity fostered."

[12] *Alu Like.* Finally, the OHA trustees had discretion to fund the Alu Like contract. That contract obligates Alu Like to provide "a comprehensive system for beneficiaries [including native Hawaiians and Hawaiians] to receive information, referrals, . . . case management, personal financial management, and

---

[9] The district court also concluded that the NHLA contract serves other § 5(f) purposes. Because it was within the trustees' discretion to determine that the NHLA contract serves to better the conditions of native Hawaiians, we do not reach the question whether it also serves other § 5(f) purposes.

emergency fund assistance" consistent with a proposal that Alu Like submitted to OHA. As the district court found, the trustees could have reasonably determined that the conditions of native Hawaiians would benefit from Alu Like's efforts to "help[ ] Hawaiians and native Hawaiians achieve social and economic self-sufficiency."

[13] In summary, there is no triable issue as to whether the OHA trustees had discretion to use § 5(f) funds for the challenged expenditures. Each was within the trustees' broad discretion to serve the trust purposes. Plaintiffs have failed to establish a violation of any federal statutory right, and the trustees are entitled to summary judgment on all of plaintiffs' § 1983 claims.

C. **Qualified Immunity**

Because we affirm the district court's grant of summary judgment on the merits, we do not reach its alternative holding that the OHA trustees are "simultaneously and redundantly . . . entitled to qualified immunity."

D. **Hawaii's Alternative Argument in Support of Summary Judgment**

We also do not reach the State of Hawaii's alternative argument in support of summary judgment, except insofar as it raises a jurisdictional issue. To the extent Hawaii contends that plaintiffs lack standing under its theory of the case, we disagree. Hawaii points out that the state spends far more each year on public education — one of the enumerated trust purposes — than it receives from the trust, and argues that this deprives any trust beneficiary of standing to bring a claim for breach of trust for lack of injury. In short, Hawaii contends that no beneficiary of the § 5(f) trust can

claim to be injured so long as the federally mandated purposes collectively are receiving more from the state than the § 5(f) trust produces.

This argument fails because, as we have previously held, the § 5(f) obligations bind OHA trustees even after funds have been directed to OHA by the state. *See Akaka I*, 928 F.2d at 827 ("So long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied."); *cf. Akaka II*, 3 F.3d at 1222 ("[T]he issue here is whether the [OHA] trustees breached their fiduciary duties under the Admission Act by expending trust funds for purposes other than those set out in § 5(f)."). How Hawaii spends other, nontrust money on trust purposes is irrelevant. Although § 5(f) gives Hawaii considerable flexibility to choose the manner in which it shall manage the trust, it cannot ignore the fundamental principle of trust law that a trustee's obligations (however broad or narrow they may be) apply with respect to the particular property or money in the corpus. Those obligations generally cannot be discharged through the use of property or money outside the corpus. *Cf. Akaka I*, 928 F.2d at 826 ("Because the OHA share of 'public trust' income at issue in this case derives directly from the § 5(b) lands, § 5(f)'s limitation on uses applies to that income." (emphasis added)); Restatement (Third) of Trusts § 2 ("Definition of Trust") ("A trust, as the term is used in this Restatement . . . is a fiduciary relationship with respect to property . . . subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee." (emphasis added)).

IV. CONCLUSION

[14] We hold that, although § 5(f) permits Hawaii to impose further rules and restrictions on management of the § 5(f) trust, it does not require the state and its agents to abide by those rules and restrictions as a matter of federal law. Those alleged violations are actionable under state law, if at all. We therefore affirm the district court's summary judgment in favor of the OHA trustees. The trustees have established as a matter of law that each of the challenged expenditures constitutes a "use" "for one or more of the [§ 5(f)] purposes" and that is sufficient to defeat plaintiffs' § 1983 claim under federal law for breach of the § 5(f) trust.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Civ. No. 05-00649 SOM/BMK
Virgil E. Day, et al., Plaintiffs,
vs.
Haunani Apoliona, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs, *et al.*, Defendants,
and
State of Hawaii, Intervenor-Defendant.
Filed: June 20, 2008

ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs are individuals who describe themselves as having "not less than one-half part" Hawaiian blood. They challenge the manner in which the Office of Hawaiian Affairs ("OHA"), the current trustee of a public land trust created by the act through which Hawaii became a state, P.L. 86-3 (March 18, 1959), *reprinted in* 73 Stat. 4, 5 ("Admission Act"), has been and is spending certain funds it controls. Plaintiffs argue that OHA is violating federal law by spending the public trust money to better the conditions of all persons having any quantum of Hawaiian blood, instead of restricting such spending to benefit only people who, like them, have "not less than one-half part" Hawaiian blood.

To the extent Count I of the First Amended Complaint seeks to hold the OHA trustees individually liable for damages under § 1983, the court grants the

individual trustees summary judgment, as the trustees are exercising their reasonable fiduciary judgment in determining how to further the purposes of the trust. To the extent Counts I, II, and IV of the First Amended Complaint seek injunctive relief or a declaration that, under the Admission Act, the OHA trustees must use public trust funds only for the betterment of the conditions of people who have "not less than one-half part" Hawaiian blood, the court rules that the Admission Act is not so restrictive. The court need not decide whether state law requires the public trust to be spent in the manner Plaintiffs advocate, as this court has already dismissed all state claims.

II. BACKGROUND

The facts pertinent to this motion have been set forth in previous decisions. See, e.g., *Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007). In brief, the public trust created by the Admission Act is to be used for one or more of five enumerated purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

P.L. 86-3, § 5(f), 73 Stat. at 6; *see also Day*, 496 F.3d at 1028; *Price v. Akaka*, 3 F.3d 1220, 1222 (9th Cir. 1993).

There is no dispute that Hawaii has delegated its public trust duties arising under the Admission Act to OHA or that the restrictions on the uses of the public trust apply to OHA. *See Price*, 3 F.3d at 1222 (noting

that the restrictions in the Admission Act "apply to the use or disposal of the income by OHA"). Under state law, "OHA is funded in part with twenty percent of all income derived from the § 5(f) public trust." *Id.*; see also Haw. Rev. Stat. § 10-13.5 (1990) ("Twenty per cent of all funds derived from the public land trust . . . shall be expended by [OHA] for the purposes of this chapter."). State law requires OHA to use trust funds "for the betterment of the conditions of native Hawaiians." Haw. Rev. Stat. § 10-3(1) ("A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature . . . , and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians."). OHA also receives other funds that need not be used for any of the purposes enumerated in the Admission Act. *See Day*, 496 F.3d at 1030.

Plaintiffs Virgil E. Day, Mel Hoomanawanui, Josiah L. Hoohuli, Patrick L. Kahawaiolaa, and Samuel L. Kealoha, Jr., (collectively, "Plaintiffs") claim to be "native Hawaiians," as that term is defined in the Hawaiian Homes Commission Act ("HHCA")," 42 Stat. 108 (1921). First Amended Complaint (March 10, 2006) ¶ 4. The HHCA defines "native Hawaiians" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108; see also *Rice v. Cayetano*, 528 U.S. 495, 507 (2000) (noting that the HHCA "defined 'native Hawaiians' to include 'any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778'"). In this order, the court uses the term "native Hawaiian" as defined in the HHCA.

As native Hawaiian beneficiaries of the public trust,

Plaintiffs claim that the OHA trustees have violated and continue to violate OHA's public trust duties by failing to use trust funds "for the betterment of the conditions of native Hawaiians" only, to the exclusion of other people. Plaintiffs challenge OHA's use of trust funds for the benefit of "Hawaiians" without regard to blood quantum.[1] See, e.g., First Amended Complaint ¶ 11. The First Amended Complaint asserts that Defendants: (1) violated their rights under the Admission Act and the Equal Protection Clause of the Fourteenth Amendment, to the extent those rights are enforceable under 42 U.S.C. § 1983, by expending public trust funds "without regard to the blood quantum contained in the definition of native Hawaiians in HHCA" (Counts I and II); and (2) "breached their duty under the common law of the State of Hawaii and H.R.S. § 10-16(c) of fidelity owed to Plaintiffs as 'native Hawaiian' beneficiaries" (Count III). Although the First Amended Complaint is not entirely clear about the relief it seeks, this court has ruled that, with respect to Counts I through III, Plaintiffs seek damages against the OHA trustees in their individual capacities, and declaratory and injunctive relief against the OHA trustees in their official capacities. See Order Dismissing Action (Aug. 10, 2006) at 4.

Count IV of the First Amended Complaint also seeks the following declaratory relief:

To the extent that . . . judicial decisions and statu-

---

[1] In this order, the court uses the term "Hawaiian" as defined in Haw. Rev. Stat. § 10-2, which uses "Hawaiian" to mean "any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii."

> tory and constitutional provisions do not clearly establish that all land, income and proceeds therefrom, received by OHA defendants directly or indirectly from the § 5(f) trust must be expended by OHA Defendants for the betterment of the conditions of native Hawaiians, Plaintiffs are entitled to a declaratory judgment holding that all land, income and proceeds received by OHA Defendants directly or indirectly from the § 5(f) trust must be expended by OHA defendants for the betterment of the conditions of native Hawaiians as defined in the [HHCA].

First Amended Complaint ¶ 32.

Plaintiffs identify four specific instances in which they say OHA is using public trust funds for purposes not limited to the betterment of the conditions of native Hawaiians. Plaintiffs say that public trust funds are being used to support (1) proposed federal legislation commonly referred to as the "Akaka Bill," (2) the Native Hawaiian Legal Corporation; (3) the Nā Pua No'eau Education Program; and (4) Alu Like. None of the four matters expressly limits itself to bettering the conditions of only native Hawaiians.

On February 22, 2006, this court granted summary judgment in favor of two former OHA trustees, Clayton Hee and Charles Ota, ruling that the statute of limitations barred Plaintiffs' § 1983 claims against them. On March 10, 2006, Plaintiffs filed a First Amended Complaint, reasserting the same § 1983 claims against Hee and Ota. On June 14, 2006, Hee and Ota filed a second motion for summary judgment based on the statute of limitations. Plaintiffs did not oppose this motion, see Statement of Non-Opposition to the Second Motion for Summary Judgment of Defendants Hee and Ota (July 21, 2006), and have since abandoned their

claims against them. See Memorandum in Opposition to OHA Defendants' Second Motion for Summary Judgment (May 22, 2008) at 2 ("On appeal, Plaintiffs did not appeal this court's dismissal . . . of claims against Defendants HEE and ODA [sic]"). Accordingly, no claims remain against Hee or Ota.

On August 10, 2006, this court dismissed the § 1983 claims asserted in Counts I and II of the First Amended Complaint, ruling that, in light of *Gonzaga University v. Doe*, 536 U.S. 273 (2002), Plaintiffs may not enforce the Admission Act through § 1983. See Order Dismissing Action (Aug. 10, 2006). The court also dismissed the Equal Protection claims asserted in Counts I and II, ruling that Plaintiffs had not alleged that they had been treated differently than similarly situated people. *Id.* Finally, the court determined that Counts III and IV of the First Amended Complaint asserted state law claims and declined to exercise supplemental jurisdiction over those claims. *Id.* To the extent Plaintiffs were attempting to seek declaratory relief under § 1983, the court dismissed the federal claims asserted in Count IV based on *Gonzaga*. Plaintiffs appealed. See Notice of Appeal (Aug. 16, 2006).

On appeal, Plaintiffs did not challenge this court's dismissal of their Equal Protection claims or their state law claims. See Memorandum in Opposition to OHA Defendants' Second Motion for Summary Judgment (May 22, 2008) ("On appeal, Plaintiffs did not appeal this court's dismissal of their equal protection claim, of claims against Defendants HEE and ODA [sic] nor state law claims asserted in Count III."). Plaintiffs did challenge this court's dismissal of the § 1983 claims asserted in Counts I and II and contended that Count IV sought a declaration pursuant to § 1983 that the

current OHA trustees owe native Hawaiians a duty of loyalty under section 5(f) of the Admission Act. See 2006 W.L. 4109553, Appellants' Opening Brief, No. 06-16625 (Dec. 18, 2006).

On December 19, 2007, the Ninth Circuit reversed this court's determination that *Gonzaga* foreclosed Plaintiffs' § 1983 claims. The Ninth Circuit held that, as alleged beneficiaries of the public trust, the native Hawaiian Plaintiffs have "an individual right to have the trust terms complied with, and therefore can sue under § 1983 for violation of that right." *Day,* 496 F.3d at 1039. The Ninth Circuit noted, "Violations of this right may include, at minimum, wrongs of the type of which Day complains: expenditure of funds for purposes not enumerated under § 5(f)." *Id.* The Ninth Circuit left it to this court "to interpret those § 5(f) purposes to determine in the first instance not only whether Day's allegations are true, but also whether the described expenditures in fact violate § 5(f)." *Id.* As Plaintiffs' state law claims had been dismissed and Plaintiffs had not appealed their dismissal, the Ninth Circuit made it clear that this court is to determine only whether OHA is violating federal law. *See id.* That is, this court must only determine whether OHA's actions comply with any of the five enumerated purposes of the public trust created by section 5(f) of the Admission Act, not whether state law requires OHA to use the public trust solely for the benefit of native Hawaiians.

III. SUMMARY JUDGMENT STANDARD.

Effective December 1, 2007, Rule 56(c) of the Federal Rules of Civil Procedure has been amended. Summary judgment shall be granted when "the pleadings, the discovery and disclosure materials on file, and

any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (effective Dec. 1, 2007). "The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." Rule 56 Advisory Committee Notes, 2007 Amendments. Because no substantive change in Rule 56(c) was intended, the court interprets the new rule by applying precedent related to the prior version of Rule 56(c).

One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). "Only admissible evidence may be considered in deciding a motion for summary judgment." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006). Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See Celotex*, 477 U.S. at 323. A moving party has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden initially falls on the moving party to identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.*, 477 U.S. at 323); accord *Miller*, 454 F.3d at 987. "A fact is material if it could affect the outcome of the suit under the governing substantive

law." *Miller*, 454 F.3d at 987.

On a summary judgment motion, "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." *Miller*, 454 F.3d at 988 (quotations and brackets omitted).

IV. ANALYSIS.

A. OHA Trustees Named As Defendants In their Individual Capacities Are Entitled To Summary Judgement on the Merits of the § 1983 Claims Asserted in Count 1.

The state law claims having been dismissed, Count 1 of the First Amended Complaint has been pared down. Still in issue are damage claims brought under 42 U.S.C. § 1983, which provides:

> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.*

Plaintiffs claim that the OHA trustees named as

Defendants in their individual capacities are individually liable for their alleged misuse of public trust funds. Count I asserts that the OHA trustees violated the provisions of the trust created by the Admission Act when they expended trust funds to (1) support the Native Hawaiian Government Reorganization Act of 2007, a.k.a. "the Akaka Bill"; (2) support the Native Hawaiian Legal Corporation; (3) support the Nā Pua No'eau Education Program; and (4) support Alu Like. The Ninth Circuit recognized that Plaintiffs may assert claims under § 1983 for "expenditure of funds for purposes not enumerated under § 5(f)" of the Admission Act. Day, 496 F.3d at 1039.

The First Amended Complaint actually attempts to allege a violation of § 1983 based on an alleged violation of state law. Plaintiffs argue that, under sections 10-3 and 10-13.5 of the Hawaii Revised Statutes, the OHA trustees were required to use the public trust only for the betterment of the conditions of native Hawaiians. However, Plaintiffs conceded at the hearing that a violation of state law is not actionable under § 1983 unless, of course, the state law violation is also a violation of a party's federal right. See Moreland v. Las Vegas Metro. Police Dept., 159 F.3d 365, 371 (9th Cir. 1998) ("state law violations do not, on their own, give rise to liability under § 1983"); Campbell v. Burt, 141 F.3d 927, 930 (9th Cir. 1998) ("As a general rule, a violation of state law does not lead to liability under § 1983."); accord Tierney v. Vahle, 304 F.3d 734, 741 (7th Cir. 2002) ("a violation of state law is not actionable under section 1983"); Bagley v. Rogerson 5 F.3d 325, 328 (8th Cir. 1993) ("We have held several times that a violation of state law, without more, does not state a claim under the federal Constitution or 42 U.S.C. § 1983."). Accordingly, for purposes of the §

1983 claim asserted in Count I, this court examines only whether the OHA trustees violated a federal right or statute, in this case, the Admission Act. Whether the OHA trustees are violating state law by using public trust funds to support the Akaka Bill, the Native Hawaiian Legal Corporation, the Nā Pua No'eau Education Program, and Alu Like is not before this court.

No material factual dispute is before this court. It is undisputed that OHA is using public trust funds to support the Akaka Bill, the Native Hawaiian Legal Corporation, the Nā Pua No'eau Education Program, and Alu Like, none of which reserves its benefits for only native Hawaiians. "The issue before this court is whether section 5(f) of the Admission Act permits the use of the public trust funds for purposes other than to benefit only native Hawaiians, *e.g.*, to support the Akaka Bill, the Native Hawaiian Legal Corporation, the Nā Pua No'eau Education Program, and Alu Like. Because these expenditures of trust funds are consistent with the Admission Act, Defendants are entitled to summary judgment on Plaintiffs' § 1983 claims.

This court recognizes that, because there is no material factual dispute in this case, any examination of the merits of Plaintiffs' § 1983 claims mirrors the analysis applicable to the qualified immunity defense Defendants raise with respect to the § 1983 claims. That is, a review of the substantive merits of the § 1983 claims requires the same consideration as a review of at least the first prong of the qualified immunity defense.

"Qualified immunity . . . shields § 1983 defendants 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or consti-

tutional rights of which a reasonable person would have known.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (*en banc*) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also Price*, 3 F.3d at 1225. The qualified immunity doctrine protects government officials from their exercise of poor judgment and fails to protect only those who are "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The purpose of qualified immunity is to protect officials from undue interference with their duties and from potentially disabling threats of liability. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1098 (9th Cir. 1994). The Supreme Court has therefore stated that qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The Supreme Court has cautioned that a ruling on a qualified immunity defense "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Id.*

The qualified immunity analysis is a two-step process. First, a court examines whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the defendant's conduct violated a constitutional or statutory right. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 961 (9th Cir. 2004). In this initial inquiry, this court is obligated to accept a plaintiff's facts as alleged, but the court need not accept a plaintiff's application of the law to the facts. *See Martin v. City of Oceanside*, 360 F.3d 1078, 1082 (9th Cir. 2004). It is this initial inquiry in a qualified immunity analysis that this court is equating in this case with a review of the substantive merits of Plaintiffs' § 1983 claims, that is, of what Plaintiffs

have the burden of establishing in their own case-in-chief. If no constitutional or statutory right would have been violated by the alleged actions, the qualified immunity inquiry ends, and a defendant has qualified immunity. If a violation could indeed be made out when the facts are interpreted in the light most favorable to the injured party, the qualified immunity analysis continues.

The court turns now to examining the details of the merits/qualified immunity issues raised by the § 1983 claims. If the OHA trustees sued in their individual capacities succeed in establishing that Plaintiffs cannot prevail with respect to the § 1983 claims, the OHA Trustees simultaneously and redundantly are entitled to qualified immunity with respect to those claims.

1. Akaka Bill.

Plaintiffs assert that the OHA trustees have violated and are violating section 5(f) of the Admission Act by spending public trust funds to support the Akaka Bill. Plaintiffs say that spending trust funds to support a bill that, if passed, will not be limited to benefitting native Hawaiians only, violates the requirement that trust funds be used for the betterment of the conditions of native Hawaiians. This court disagrees.

The OHA trustees are charged with administering the public trust. Under the terms of the Admission Act, they are allowed to use trust funds for the betterment of the conditions of native Hawaiians. Because the Admission Act is silent as to exactly how the funds must be used to better the conditions of native Hawaiians, the OHA trustees have broad discretion in making that determination. Section 87 of the Restatement (Third of Trusts (2007) notes that, "When a trustee has discretion with respect to the exercise of a

power, its exercise is subject to supervision by a court only to prevent abuse of discretion." The Ninth Circuit has already recognized the possibility that the OHA trustees may exercise their discretion in using public trust funds in a manner that benefits native Hawaiians, as well as others. In fact, the Ninth Circuit has already provided guidance regarding the merits of Plaintiffs' claims:

> Although we do not address the merits of Day's claims, we note for the sake of example and clarity that the common law of trusts offers guidance on two of the issues that Day's claims present: (1) how a court should determine whether activities funded by the trust funds are "for the betterment" of Native Hawaiians, and (2) whether trust funds can be spent in a way that serves Native Hawaiians, but also, incidentally, benefits other individuals. One treatise suggests: To the extent to which the trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him. . . . Even where the trustee has discretion, however, the court will not permit him to abuse the discretion. This ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment.

Day, 496 F.3d at 1034 n.10 (citing Austin W. Scott & William F. Fratcher, 3 THE LAW OF TRUSTS § 187 (4th ed. 2001)).

Plaintiffs conceded at the hearing on the present motion that the OHA trustees had broad discretion in determining what is for the betterment of the condi-

tions of native Hawaiians, but argued that the OHA trustees abused their discretion in supporting the Akaka Bill. This court disagrees. The Akaka Bill seeks to provide for a process through which the United States will recognize a Hawaiian governing entity. See Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007). The Akaka Bill provides that it does not affect the definition of "Native Hawaiian" under any other federal or state law. *See id.* sec. 3, ¶10(B).

This court is guided by the comments to section 87 of the Restatement, which provides an example of a trustee's broad discretion in exercising the powers of a trusteeship. It notes that, even when the trust has mandatory provisions, "the trustee often has some discretionary authority and responsibility in important matters of detail and implementation." RESTATEMENT (THIRD) OF TRUSTS § 87, cmt. a. (2007). For example, a trust may require the sale of property. If the trust fails to further describe the details of how the property is to be sold, a trustee may exercise "fiduciary judgment with respect to the timing . . . , price, and other terms of the sale." *Id.*

Like a trustee's exercise of fiduciary judgment in the details of the sale of the property, the OHA trustees may exercise reasonable fiduciary judgment in expending trust funds in support of the Akaka Bill. Even if the Akaka Bill is intended to benefit Hawaiians in general, the OHA trustees would not be unreasonable or arbitrary in viewing the Akaka Bill as also benefitting native Hawaiians. Numerous legal challenges have been brought against Hawaiian-only and native Hawaiian-only programs. These legal challenges often assert Equal Protection violations. Although most

race-based preferences are subject to "strict scrutiny," preferences given to American Indian tribes are reviewed under the "rational basis" standard. *See Morton v. Mancari*, 417 U.S. 535 (1974). The passage of the Akaka Bill might ultimately affect whether programs benefitting only Hawaiians and native Hawaiians are reviewed under the "strict scrutiny" standard as involving racial preferences, or under a "rational basis" standard as involving a political preference. It cannot be said that the OHA trustees are abusing their discretion in supporting legislation that could affect challenges to programs favoring Hawaiians and native Hawaiians. The OHA trustees are reasonably exercising their fiduciary judgment when they expend trust funds in support of the Akaka Bill. That action is consistent with the public trust requirement that trust funds be used for the betterment of the conditions of native Hawaiians, even if the funds simultaneously better the conditions of Hawaiians.

Nothing in section 5(f) of the Admission Act prohibits the use of trust funds that, while bettering the condition of native Hawaiians, also benefits the conditions of others. Plaintiffs read section 5(f) in a cramped, exclusionary manner that, if accepted, could lead to ridiculous results. Suppose, for instance, that the OHA trustees decided to better the conditions of native Hawaiians by giving each native Hawaiian $5,000. A particular native Hawaiian might donate his $5,000 to the American Cancer Society, while another might buy a piece of jewelry. Would Plaintiffs sue OHA for failing to limit the use of the first person's $5,000 to the provision of goods to only native Hawaiians, while the second person's use was legal because it was used to buy something personal for that particular native Hawaiian?

Or suppose a particular disease disproportionately affected native Hawaiians. And suppose further that OHA, in an attempt to address an epidemic affecting a large percentage or even a majority of native Hawaiians, initiated a study or contributed to a pre-existing research program concerning the disease. Would Plaintiffs object because the expenditure would also benefit Hawaiians or, say, Samoans who also suffered from the disease? Would OHA be barred under Plaintiffs' reasoning from supporting such research simply because its benefits would not flow exclusively to native Hawaiians?

As a final illustration, the court considers whether Plaintiffs would challenge a program in which OHA offered to pay all medical expenses relating to the birth of any native Hawaiian child. These expenses would naturally include the cost of prenatal care for the birth mother. But suppose the birth mother was Hawaiian, with a 25 percent blood quantum, while the birth father was native Hawaiian, with a 75 percent blood quantum. The child would be native Hawaiian, but treatment during the pregnancy would benefit not only the native Hawaiian child, but also the Hawaiian mother. Would Plaintiffs object to the benefits flowing to the Hawaiian mother? The court presents these scenarios only to highlight that the logical result of Plaintiffs' position could ultimately be detrimental to native Hawaiians. The OHA trustees must be allowed to exercise reasonable judgment in determining how to satisfy section 5(f). In including the purpose of bettering the conditions of native Hawaiians, section 5(f) simply does not, as Plaintiffs contend, hamstring the trustees by requiring that they absolutely avoid simultaneously benefitting others.'

Plaintiffs themselves, while challenging simultaneous benefits, may not actually think all simultaneous benefits are improper. At the hearing, Plaintiffs praised OHA's recent use of the public trust to support the Department of Hawaiian Home Lands' provision of housing to native Hawaiians. However, the Department of Hawaiian Home Lands does not restrict who can live in a Hawaiian Home Lands house. When the Department of Hawaiian Home Lands grants a house to an eligible native Hawaiian, the native Hawaiian might live in the house with a non-Hawaiian spouse and Hawaiian children. If Plaintiffs accept this situation as consistent with section 5(f), the court wonders why they challenge other expenditures that benefit not only native Hawaiians but Hawaiians as well.

Consistent with the Ninth Circuit's guidance in *Day*, 496 F.3d at 1034 n.10, the RESTATEMENT makes clear that courts "will not interfere with a trustee's exercise of a discretionary power . . . when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties." RESTATEMENT (THIRD) OF TRUSTS § 87, cmt. b. (2007). Nothing in the record indicates that the OHA trustees are supporting the Akaka Bill in bad faith or based on an otherwise improper motive. The OHA trustees are entitled to summary judgment on the merits of Plaintiffs' § 1983 claim seeking individual liability for the trustees' support of the Akaka Bill.

At the hearing, Plaintiffs argued that the OHA trustees are breaching the public trust because the benefit to native Hawaiians is the same as the benefit to every other member of the public. This court is unpersuaded. The Akaka Bill does not benefit every

member of the public equally. The OHA trustees are exercising their reasonable fiduciary judgment and broad discretion in spending public trust money lobbying for a bill that lays the foundation for recognition of a Hawaiian/native Hawaiian government.

Although this court earlier in this order equated its analysis of the substantive merits of the § 1983 claims with the application of the first prong of the qualified immunity test, the court is struck by the similarity between the court's examination of the OHA trustees' reasonableness or good faith and the second prong of the qualified immunity test. That second prong, which is not reached if no constitutional violation is made out by a plaintiff's allegations, inquires whether the right allegedly violated was clearly established. That is, a defendant has qualified immunity if the law did not put him or her clearly on notice that the conduct in issue was unlawful. *Saucier,* 533 U.S. at 201. The conclusion here that the OHA trustees acted reasonably and within their discretion as trustees is akin to a conclusion that they violated no clearly established law.

Similarly, in *Price,* 3 F.3d 1220, a § 1983 claim asserted that the OHA trustees improperly used section 5(f) public trust funds to mail and distribute referendum ballots. The trustees had proposed a "Single Definition Referendum" concerning whether the definition of "native Hawaiian" should be amended to include all people of Hawaiian ancestry and not just those with 50% or more Hawaiian blood. *Id.* at 1222. The plaintiffs in *Price* alleged that this use of trust funds violated the terms of section 5(f) of the Admission Act because funds were used to benefit non-native Hawaiians. *Id.* at 1223. The Ninth Circuit determined,

in a pre-*Saucier* case, that the OHA trustees had qualified immunity from these claims, as "there is no clearly established law prohibiting the OHA trustees from expending § 5(f) funds in support of the Single Definition Referendum which questioned the 50% or more blood quantum requirement for native Hawaiian status." *Id.* at 1225. In so ruling, the Ninth Circuit stated that the "OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of 'native Hawaiian' was for the 'betterment of the conditions of native Hawaiians' as presently defined." Id. at 1226. The OHA trustees' belief that support of the Akaka Bill benefits native Hawaiians is equally reasonable.

2. Native Hawaiian Legal Corporation.

There is no dispute that the OHA trustees are using trust funds to support the Native Hawaiian Legal Corporation. Exhibit B to the Concise Statement in support of the Second Motion for Summary Judgment is a contract between OHA and the Native Hawaiian Legal Corporation.[2] Page two of the contract states that, consistent with Act 170, Regular Session Laws of Hawaii, 2007, the Native Hawaiian Legal Corporation is awarded $567,302.00 from general funds and $567,302.00 from the public trust fund for fiscal year 2007-2008. For fiscal year 2008-2009, those amounts

---

[2] Plaintiffs challenge the authenticity of OHA's contract with the Native Hawaiian Legal Corporation, claiming that it is not authenticated. However, this contract is properly authenticated by the Declaration of Ernest M. Kimoto, who states that he is the senior counsel to the Administrator at OHA and that Exhibit B is a true and accurate copy of the contract contained in OHA's records and files. Declaration of Ernest M. Kimoto (March 27, 2008) ¶¶ 1, 4.

increase to $592,302.00, respectively. Plaintiffs argue that this use of trust funds does not further any purpose set forth in the Admission Act. The court disagrees.

According to page 3 of OHA's contract with the Native Hawaiian Legal Corporation, the Native Hawaiian Legal Corporation is to

> render legal services and provide legal representation to clients in substantive areas which shall include but shall not be limited to:
>
> (a) Assertion and defense of quiet title actions;
>
> (b) Protection, defense and assertion of ahupua'a and kuleana tenant rights, including rights of access and rights to water;
>
> (c) Land title assistance, including review of title and genealogy;
>
> (d) Preservation and perpetuation of traditional and customary practices;
>
> (e) Protection of culturally significant places, including burial sites and material culture; and
>
> (f) Preservation of Native Hawaiian Land Trust entitlements.

As noted above, the Admission Act requires trust lands and funds to be used for one or more of five enumerated purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public

use.

P.L. 86-3, § 5(f), 73 Stat. at 6; *see also Day*, 496 F.3d at 1028; *Price*, 3 F.3d at 1222.

OHA's contract with the Native Hawaiian Legal Corporation and OHA's resulting expenditure of trust funds supports more than one of the public trust's purposes. The provision of legal services arguably betters the conditions of native Hawaiians because it helps to preserve and perpetuate their traditional and customary practices, protect culturally significant areas, and help them assert their legal rights regarding land and water in court. The Native Hawaiian Legal Corporation contract also can be said to aid farm and home ownership, as it specifically calls for the assertion and protection of land and water rights. Conceivably, the Native Hawaiian Legal Corporation's services will make public improvements in the course of asserting rights of access and protecting culturally significant places. Finally, the contract can be said to help provide for lands for public use, as it calls for the protection of culturally significant places and for the preservation and perpetuation of traditional and customary practices.

Nothing in the record establishes that the OHA trustees failed to use reasonable judgment in interpreting the Admission Act as allowing OHA to support this program to benefit native Hawaiians, while simultaneously benefitting Hawaiians in general. As Plaintiffs do not establish that the OHA trustees abused their discretion in this regard, Plaintiffs cannot prevail on this point. The OHA trustees are entitled to summary judgment on Plaintiffs' § 1983 claims challenging the Native Hawaiian Legal Corporation expenditure.

3. Nā Pua No'eau Education Program.

There is no dispute that the OHA trustees are distributing trust funds to the University of Hawai'i at Hilo, for and on behalf of Nā Pua No'eau, the Center for Gifted and Talented Native Hawaiian Children. OHA has entered into a contract with the University of Hawai'i at Hilo, agreeing to provide it with $490,433 in general funds and $490,433 in trust funds for fiscal year 2007-2008. This contract is consistent with the funding provided by the Hawaii legislature in Act 170, section 6, Regular Session Laws of Hawaii, 2007. According to page 2 of the contract, which is attached to Defendants' Concise Statement as Exhibit D, the University of Hawai'i at Hilo, through its Nā Pua No'eau program, is to "provide for educational enrichment programs for native Hawaiian children in grades K through 12 throughout the State of Hawaii."[3] The program is "to be designed to optimize learning for Hawaiian students" and is supposed "to develop a stronger interest in learning, connect learning and education to one's Hawaiian identity, and explore possible educational, career and academic goals."

The use of trust funds to support this educational program is consistent with the Admission Act, which allows the trust to be used for the support of public schools and other public educational institutions. There is no dispute that the University of Hawai'i at Hilo is a public educational institution. Although the trust money being given to it is intended to benefit only

---

[3] Plaintiffs question whether the Nā Pua No'eau contract has been properly authenticated. Kimoto, a senior counsel to the Administra-tor at OHA, states in his declaration that a true and accurate copy of the contract contained in OHA's records and files is attached as Exhibit D. Kimoto Decl. ¶¶ 1, 5. The contract is properly authenticated.

a small portion of students--those with Hawaiian ancestry, the trustees have not abused their reasonable discretion in determining that provision of trust funds to the university is consistent with the trust's purposes. The OHA trustees exercising their fiduciary judgment may determine that public education is being furthered by supporting the Nā Pua No'eau program.

The use of trust funds to support the Nā Pua No'eau program also arguably betters the conditions of native Hawaiians in ensuring that learning is connected to students' Hawaiian identity. Native Hawaiians stand to benefit if Hawaiian identity in general is preserved and pride in Hawaiian identity fostered. The OHA trustees were authorized to exercise their fiduciary judgment in determining the details of how to better the conditions of native Hawaiians through the use of trust funds. Nothing in the record establishes that the OHA trustees failed to use reasonable judgment in interpreting the Admission Act as allowing OHA's support of this program, which, while benefitting native Hawaiians, also benefits Hawaiians in general. The OHA trustees are entitled to summary judgment with respect to the § 1983 claims concerning this program.

4. Alu Like.

Pursuant to a contract, the OHA trustees are disbursing public trust funds to Alu Like. See Ex. E to Defendants' Concise Statement.[4] On page 4 of that

---

[4] Plaintiffs challenge the authenticity of the Nā Pua No'eau contract. Kimoto, a senior counsel to the Administrator at OHA, states in his declaration that a true and accurate copy of the contract contained in OHA's records and files is attached as Exhibit E. Kimoto Decl. ¶¶ 1, 6. The contract is properly

contract, OHA agrees to provide Alu Like with $830,000. In Act 170, the Hawaii legislature explains that $415,000 will come from general funds and $415,000 from public trust funds. See Session Laws of Haw., Act 170, section 5 (Reg. Sess. 2007). Alu Like is a nonprofit organization that strives to help Hawaiians and native Hawaiians achieve social and economic self-sufficiency through the provision of early childhood education and child care, elderly services, employment preparation and training, library and genealogy services, specialized services for at-risk youth, and information and referral services. See Proposal Application (attached as part of Ex. E). In supporting Alu Like, the OHA trustees have exercised their reasonable discretion and fiduciary judgment. Alu Like's programs better the conditions of native Hawaiians and support public education, the first and second purposes listed in section 5(f) of the Admission Act. The OHA trustees did not abuse their considerable discretion in determining that one of the ways they were going to better the conditions of native Hawaiians was by providing support to a service organization with the mission of helping Hawaiians and native Hawaiians achieve social and economic self-sufficiency. Because the OHA trustees acted consistently with their duties under the Admission Act, the OHA trustees are entitled to summary judgment with respect to Plaintiffs' § 1983 claims asserting that the trustees have improperly used public trust funds in support of Alu Like.

B. **OHA Trustees Are Entitled to Summary Judgment on Plaintiffs' Declaratory and Injunctive Relief Claims.**

---

authenticated

Courts recognize that state officials may be sued in their official capacities for prospective injunctive relief under § 1983:

> In *Will v. Michigan Department of State Police*, 491 U.S. 58, 70, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Supreme Court held that "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes" are not "persons" under § 1983. . . .
>
> Will recognized one vital exception to this general rule: When sued for prospective injunctive relief, a state official in his official capacity is considered a "person" for § 1983 purposes. *Will*, 491 U.S. at 71 n.10, 109 S. Ct. 2304 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985))). This exception recognizes the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), that a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity.

Flint v. Dennison, 488 F.3d 816, 825 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 882 (2008).

Whether Plaintiffs seek declaratory and injunctive relief pursuant to § 1983 against the OHA trustees in their official capacities in Count I of the First Amended Complaint is unclear. However, Plaintiffs do clearly seek such relief from the OHA trustees in their official capacities in Count II, which seeks declaratory and injunctive relief with respect to OHA's support of the

Akaka Bill. To the extent declaratory and injunctive relief is sought under § 1983 in Count I and II, the OHA trustees sued in their official capacities are entitled to summary judgment.

In so ruling, this court is not relying on the OHA trustees' argument that Plaintiffs' claim with respect to the Akaka Bill is not ripe because that bill has not yet been finalized or enacted by Congress. Plaintiffs are asserting that any expenditure of trust funds in support of legislation that does not clearly benefit only native Hawaiians is improper. Although the Akaka Bill might be amended to support only native Hawaiians' rights, that is not an amendment that the OHA trustees have sought. This case instead involves whether the trustees are properly exercising their discretion in using trust assets to support iterations of the Akaka Bill that are being proposed. As discussed above, the OHA trustees properly exercised their considerable discretion and fiduciary judgment in determining that public trust funds could be used to support the Akaka Bill, the Native Hawaiian Legal Corporation, the Nā Pua No'eau Education Program, and Alu Like. Plaintiffs are therefore not entitled to either a declaration that the expending of the public trust funds in that manner violates the Admission Act or an injunction prohibiting such conduct.

In Count IV, Plaintiffs seek a declaration that clearly established federal law requires public trust funds to be used solely for the betterment of the conditions of native Hawaiians. As discussed above, the Admission Act requires the public trust to be used for one of five enumerated purposes. Whether or not state law requires the OHA trustees to use the trust solely for the betterment of the conditions of native

Hawaiians, federal law is not so restricted.

C. **The Court Declines to Strike Plaintiffs' Concise Statement.**

The OHA trustees ask the court to strike Plaintiffs' Concise Statement. The trustees claim that this document may exceed the page and/or word limitation applicable to concise statements and that it lacks the certificate of compliance required by local court rule. The court declines to strike Plaintiffs' concise statement. First, much of the length of Plaintiffs' Concise Statement results from its quoting of Defendants' Concise Statement. Had Plaintiffs simply referred to paragraph numbers from Defendants' Concise Statement along with their explanation as to whether the facts asserted therein were disputed or admitted, the concise statement would have been significantly shorter and within the applicable limitations. More importantly, however, because Defendants are being granted summary judgment by this order, they are not prejudiced by Plaintiffs' Concise Statement.

D. **The Court Declines to Strike The State of Hawaii's Position Statement.**

On May 22, 2008, the State of Hawaii submitted a statement regarding its position on the OHA trustee's second motion for summary judgment. Plaintiffs ask the court to strike that position statement on the ground that the state is not a party to this case. The court denies Plaintiffs' motion, as the Ninth Circuit has allowed the state to intervene in this matter. *See Day v. Apoliona,* 505 F.3d 963 (9th Cir. 2007). This court does not read that allowance as limited to appellate proceedings. Even were the Ninth Circuit's ruling so limited, this court would itself permit the State to intervene here.

V. CONCLUSION.

For the foregoing reasons, summary judgment is granted in favor of Defendants on the remaining claims asserted in the First Amended Complaint. This order renders moot the State of Hawaii's separate Motion for Summary Judgment (June 4, 2008). This order also renders moot Wendell Marumoto's motion to intervene (June 16, 2008). Because no other claims remain for adjudication, the Clerk of Court is directed to enter judgment in favor of Defendants, to terminate all pending motions, and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 20, 2008.

Susan Oki Mollway

United States District Judge

Deposition of Cyde Namuo, May 8, 2008, pages 8-12:

Q. Now according to that article it says:
"Currently, about ten percent of OHA's 28 and a half million in funding comes from state taxes, with the rest from ceded lands."
Is that a true statement? Is that a statement come from you, that information?
A. Yes.
Q. Is that a correct and accurate statement?
A. It is correct, the ten percent of our annual appropriation comes through an appropriation by the Legislature.
Q. And the balance comes from ceded lands?
A. That is not a correct statement.
Q. It's not?
A. And I would not have made that statement to Mr. Pang.
Q. Okay
A. Because it's not—it is not a completely correct statement.
Q. Would you correct it then?
A. The income stream is three million dollars approximately from State general funds 15.1 million annually are ceded land revenues. And approximately anywhere from fifteen to 18 million comes off of earnings from our investments.
Q. How much from earnings?
[Page 9]
A. Anywhere from fifteen to 18 million
Q. Now, and that is money that's been accumulated from past appropriations of ceded land money; isn't that correct?

A. No.
Q. No. Where does the source of the investments that are producing the fifteen to 18 million?
A. It comes from various sources. Part of it could have included ceded land revenues. But that would have been before the time that I worked at OHA. Also when the portfolio earns a certain amount of income those funds are reinvested. So we don't withdraw, we don't draw down all of the earnings, just a portion of the earnings.
A. So when you started in 2001 how much was in that fund?
Q. Roughly—
MS CATALDO: Let me object as vague and ambiguous. If you understand what counsel meas as to "that fund" go ahead and answer.
Q. (By Mr. Schoettle) All right.
A. If I could get some clarification.
Q. Yeah.
A. Are you asking the amount of the investment portfolio, yes. The value of the investment portfolio.
Q. I am asking what was the value of it when you started. You said you didn't know where it came from. Because it was there when you came. How much was there when [Page 10] you came?
A. Approximately 225 million.
Q. And how much is it now?
A. Um, approximately 409 million.
Q. Now since you have been there what's going into that fund?
A. Um, since I have been there the fund, funds that are earned off the investments are reinvested. So those funds go back into, they help to grow the portfolio.

Q. Except for the fifteen to 18 million?
A. That's correct.
Q. Have there been any other deposits made into that fund other than retained earnings?
A. Yes.
Q. What were those?
A. In 2006 the State settled a portion of the obligation of ceded land revenues going forward. Part of that settlement was 17.5 million dollars.
Q. And that was ceded land revenue?
A. That was payments from the State for obligations that were owed to the Office of Hawaiian Affairs for the period of 2005 to 2007.
Q. Yeah. But that was ceded land, that was in lieu of ceded land revenue, correct?
A. No. That was in addition to ceded land revenue.
[Page 11]
Q. It was based, it was in compensation for ceded revenue that you hadn't gotten from previous years, right?
A. That's correct.
Q. So it was in lieu of or in place of ceded revenue land?
A. It was in addition to. The State paid a certyain amount between the period of 2005 to 2007. This, the 17.5 million was the difference between what the State paid us versus 15.1 million which was the amount that the Legislature approved for ceded land revenues going forward.
Q. Well, I am getting totally more and more confused here. Was this money, would this money have been considered general fund tax money?
A. No.
Q. Would it be considered ceded land money? In other words, you're aware of Mr. Burgess' cases

involving the objections to using taxpayer money for OHA, right?

A. Yes.

Q. So would this 17 million have been consedered tax money or ceded land money?

A. Ceded land money.

Q. All right. Since you have been there has anything gone into the investment portfolio other than something that would be considered to be ceded land revenue?

A. I am not sure. I am not sure if you consider [Page 12] earnings off the investment to be ceded lands revenue. I am not sure of that.

MS. CATALDO: If I could ask, if he has to wait for you to finish your questyion, if you woulod wait for him to finish his answer.

THE WITNESS: I am not sure if you would define the interest that you earn off the investments as ceded lands revenue.

Q. (By Mr. Schoettle) I wasn't talking about retained earnings. I am just talking about additional money that is being deposited into the fund. Not counting, not considering income frm the fund itself. But outside money that is bing put into the fund from any soiurce other than ceded lands.

A. I am not aware of any other funds tthat were deposidted into the investment accounts.

Q. Except?

A. Except ceded lands revenues and earnings off the investments.